United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,630

JOSEPH Y. HOUGHTON,

Appellant,

v.

J. WILLIAM PIKE,

Appellee.

Appeal From a Judgment of the United States
District Court for the District of Columbia

CARLETON U. EDWARDS, II
1000 Vermont Avenue, N.W.
Washington, D. C.

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STATEMENT OF QUESTION PRESENTED

Where a civil action in the District Court (CA 880-57), brought by a plaintiff (inventor) concluded in July, 1959 (after and in accordance with a mandate from the U.S. Supreme Court), by a District Court order which continued in effect the impounding of the court record in said action, which had been entered at the instance of, and for the protection of, the said plaintiff inventor, does the action of a patent attorney filing a "petition" with a "miscellaneous" caption, in 1964, without filing a complaint, without disclosing for whom he was acting, without arranging for service of process upon anyone, and without either "real party in interest" before the court, and by merely mailing a copy of nis "petition" to an attorney who represented the said plaintiff inventor in the earlier action, confer upon the Court jurisdiction to set aside the earlier order and deimpound the said record?

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Appeal From a Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia granting appellee's " . . . Petition for Access to Impounded Record," and denying appellant's motion to dismiss said petition, which judgment was entered on March 3, 1964 (JA 13); this appeal was filed on March 6, 1964 (JA 15).

This Court has jurisdiction by virtue of 28 U.S.C. Sections 1291, 1294 and 2106 to review the judgment of the Court below.

STATEMENT OF THE CASE

(PRIOR TO THE INSTANT MATTER) (Generally JA 4-6)

On April 10, 1957, Jerome S. Spevack filed a Complaint (CA 880-57) for an Injunction against the members of the U.S. Atomic Energy Com-

mission requesting that they be enjoined from publishing the subject matter of Spevack's invention which he had previously revealed to them, which invention was subject to a "secrecy order". A temporary restraining order was issued.

Proceedings on Spevack's Motion for Preliminary Injunction were held in camera to guard against public disclosures detrimental to Spevack. Ex parte exhibits most of which were affidavits (hereinafter sometimes called the "affidavits") prepared by employees and agents of A.E.C. were produced on their behalf, which asserted in substance that actions alleged to constitute a "publication" by said A.E.C. had occurred prior to the institution of said suit. Spevack challenged these contentions but the Court denied his motion for injunction on the ground of mootness, solely on the basis of said affidavits. The Court continued the injunction against disclosure by Strauss, et al., pending appeal, and ordered the entire record impounded because of said affidavits, which impounding continues until the present date.

Thereafter the said injunction against disclosure and the impounding of the record was continuously in effect through two separate opinions and decisions of this Court, after each of which the U.S. Supreme Court granted certiorari. See Spevack v. Strauss, 101 U.S. App. D.C. 339, 248 F.2d 752, vacated 78 S. Ct. 536, 355 U.S. 601, 2 L. Ed. 2d 525, and Spevack v. Strauss, 103 U.S. App. D.C. 204, 257 F.2d 208, cause remanded 79 S. Ct. 721, 359 U.S. 115, 3 L. Ed. 2d 673.

Both Supreme Court opinions reflect the intense interest of the scientific community in protecting the interests of scientists and inventors, and in the merits of the controversy, as said opinions show that briefs amici curiae urging reversal were filed in each instance for the American Chemical Society and for the Engineers Joint Council, Inc., scientific societies numbering many thousands of scientists among their membership.

After the Supreme Court had considered the case for the second time the injunction (stay) against disclosure and the impounding of the record was continued (until Spevack's U.S. patent involving the process in question issued, etc.), with the further direction that then " . . . the proceedings heretofore had in the two lower courts are vacated."

On July 23, 1959, the matter came on before Judge Letts at which time counsel for Strauss et al. presented an order which provided for a deimpoundment of the record (among other things). Judge Letts refused to sign the proposed order and deleted the portion providing for the deimpoundment, and then signed the order as amended (JA 14). Thus the Clerk of the District Court has continued to maintain the record impounded.

(THE INSTANT MATTER)

On January 31, 1964, the appellee, J. William Pike, a patent attorney, filed in the Clerk's office of the U.S. District Court a paper entitled "In Re Petition of J. William Pike for Access to Impounded Record", which was given the designation by the Clerk of "MISC 4-64" (JA 2). Pike did not identify the client for whom he was appearing but stated: "He represents a client who is interested in determining when there was first published the subject matter of the Spevack U.S. patent application Serial No. 188,295 which eventually issued as patent No. 2,895,803." No summons was issued and no process was served on anyone (JA 1), but Pike indicated by his certificate of service that he had mailed a copy of the said petition to Joseph Y. Houghton (JA 3, 11), one of the attorneys representing Jerome S. Spevack in Civil Action 880-57 mentioned above which had concluded by an order signed by Judge Letts on July 23, 1959 (JA 14).

The aforementioned "petition" was not served on Jerome S. Spevack, the person most interested in the impounding of the record in CA 880-57; and as mentioned above, the person whom J. William Pike was representing was not disclosed (JA 2).

Thereafter Houghton appeared in his own behalf and filed a Motion to Dismiss the said petition for want of jurisdiction on the basis that no "action" was pending, that neither "real party in interest" was before the court, and also that the matter had already been considered between the parties involved and decided by the court in CA 880-57, and that there was no statutory or other basis for the said petition (JA 7, 12).

Thereafter the appellant Houghton filed his affidavit indicating that he had received a copy of the aforementioned petition in the mail but that he had no authority to submit the interest of Jerome S. Spevack in the matter to the jurisdiction of the Court (JA 11).

On March 3, 1964 the petition and motion to dismiss came on for hearing in the District Court and an order was signed denying Houghton's motion to dismiss and granting the petition and providing that the record remain impounded pending appeal if an appeal was noted from the order within five days, etc.

On March 6, 1964 the notice of appeal was filed (JA 15).

RULES INVOLVED

Federal Rules of Civil Procedure

Rule 1. Scope of Rules. These rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 2. One Form of Action. There shall be one form of action to be known as "civil action."

Rule 3. Commencement of Action. "A civil action is commenced by filing a complaint with the court."

Rule 7. Pleadings Allowed; Form of Motions.

* * *

(b) Motions and Other Papers
(1) "An application to the court for an order shall be by a motion. . . ."

Rule 17. Parties, Plaintiff and Defendant; Capacity.

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; . . ."

STATEMENT OF POINTS

1. The petition should have been dismissed because there was no "action" pending.

2. The petition should have been dismissed because neither "real party in interest" was before the Court.

3. The petition should be dismissed because of the matter of deim-poundment of the record had already been considered by Judge Letts and denied.

4. The petition should be dismissed because there is no known statutory or other basis for the petition.

5. The petition should be dismissed because the order appealed from violated the principles in equitable jurisprudence recognized in prior proceedings, involved in this matter by the Supreme Court.

SUMMARY OF ARGUMENT

Jerome S. Spevack invented a process pertaining to "heavy water" which was revealed to the U.S. Atomic Energy Commission in confidence, after which he was directed to apply for a U.S. patent, and a "secrecy order" was imposed prohibiting him from revealing the details of the process to anyone, which also prevented him from applying for foreign patents upon the process. This secrecy order remained in effect until

the A.E.C. announced that it was going to declassify and publish some previously classified information, including Spevack's process. After other efforts failed Spevack filed suit for an injunction to restrain the proposed publication and a temporary restraining order was issued. On motion for preliminary injunction the proceedings were held in camera and the record was impounded for Spevack's protection. The motion was denied on the sole ground (and without a proper hearing) of certain affidavits made by A.E.C. employees that certain steps had been taken prior to the institution of the suit, upon the basis of which the Court dismissed the action as moot. The injunction against disclosure and the impounding of the record remained in effect, however, pending consideration of the case on two occasions by this Court, and by the U.S. Supreme Court. The U.S. Supreme Court by its order continued the injunction, etc., until the issuance of Spevack's U.S. patent. The case came on before the District Court in July, 1959 at which time A.E.C. attorneys presented an order providing for a de-impoundment of the record. Judge Letts deleted such portion of the order and the record continued impounded.

Appellee here, in 1964, filed a "petition" in the District Court, but no complaint, etc., and served a copy of this, which in effect requested "access to the impounded record", upon appellant, one of Spevack's attorneys in the case heretofore mentioned, and appellant moved to dismiss for lack of jurisdiction, etc. Spevack, whose interest it is to maintain the impounding cannot be brought before this court merely by mailing a copy of the "petition" on the attorney who represented him years earlier. In addition the party for whom the petitioner was acting was not disclosed, and thereby violates the Federal Rules. There is also no "action" pending before the Court on this "Petition". Also there is no known statutory or other known basis for proceeding in such a manner, and the matter has already been considered as between the parties to the earlier action and decided. In addition, under equitable principles, the A.E.C. in effect committed a

breach of trust in attempting to reveal the details of Spevack's process, and the Court should not compound the effect thereof, after the matter has already been ruled upon.

ARGUMENT

I. The Petition Should Have Been Dismissed Because There Was No Action Pending

Here the petitioner has merely filed a "Petition of J. William Pike for Access to Impounded Record". This petition which has been given the Court designation "Misc. 4-64" is not an "action". In this respect the petition violates a Federal Rules of Civil Procedure — Rule 3, which states "A Civil Action is commenced by the filing of a complaint with the Court." No complaint has been filed in this case as shown by the docket entries (JA 1). It goes without saying that no summons has been served upon anyone served as also shown by the docket entries (JA 1).

In addition, the petition violates Federal Rules of Civil Procedure — Rule 7 (b) states in part, "Application to the Court for an order shall be by motion. . . ."

II. The Petition Should Have Been Dismissed Because Neither "Real Party in Interest" Was Before the Court.

The "petition" states in part: "He represents a client who is interested in determining. . . ." (JA 2). Thus, the real party in interest (his client) has not been disclosed and the petition violates Federal Rules of Civil Procedure — Rule 17 (a) which states in part, "Every action shall be prosecuted in the name of the real party in interest. . . ." The petition therefore shows on its face that the petitioner is **not the "real party in interest."**

In addition a very "real party in interest", Jerome S. Spevack, who sought to and succeeded in keeping the record impounded throughout the

civil proceedings in Civil Action 880-57 (and to date), in this Court and the U.S. Supreme Court is not a party to this petition nor is he before the Court merely by the petitioner's action of mailing a copy of a petition to counsel who represented Spevack in a case which concluded in July, 1959 (JA 3).

III. The Petition Should Be Dismissed Because of the Matter of De-impoundment of the Record Had Already Been Considered by Judge Letts and Denied. (JA 14)

The order of Judge Letts, which was the final order in Civil Action 880-57 in the lower court on July 23, 1959, indicates that the matter of the deimpoundment of the record was submitted to him in the proposed order and specifically deleted, leaving the former impounding order in effect and which the Clerk of the Court continues to follow and abide by.

V. The Petition Should Be Dismissed Because There Is No Known Statutory or Other Basis for the Petition.

The jurisdiction of the U.S. District Courts is prescribed by statute, and should be found in either the U.S. Code, the D. C. Code, or at least there should be some mention of it in the local Civil Rules. Appellant's counsel has been unable to discover **any** statutory or other basis either in the laws referenced above or elsewhere, or any indication as to what rules apply (other than the Federal Rules of Civil Procedure, which apply to Federal Courts generally) in this action. In the absence of some such basis, it is submitted that the lower court has no jurisdiction to entertain this petition. Appellee admits, or claims, that this is not a civil action. Appellant asks, if it is not a civil action, then what is it, what is the authority for filing it, and what rules apply?

V. The Petition Should Be Dismissed Because the Order Appealed From Violated the Principles of Equitable Jurisprudence Recognized in Prior Proceedings Involved in This Matter by the Supreme Court.

Spevack revealed his improved process to the Atomic Energy Commission in confidence and the U.S. Supreme Court by a series of orders maintained and prohibited the said commissioners from revealing the details of this process until the time Spevack's U.S. patent, issued in July, 1959 — and also continued the impoundment of the record. This without more indicated that the said commissioners had no right to publish the details of this process or make it public information; and thus, the information contained in the affidavits, to which the petitioner herein seeks to obtain access and de-impoundment should also never have been made. While there is no such equitable axiom as "that which ought not to have been done will be regarded as not having been done . . .", basic principles of equity would seem to support this as a principle of equitable jurisprudence. While it is not felt that the material in the affidavits would have the affect of invalidating Spevack's patents, they could result in considerable litigation and cause him much expense and harassment, to which he would never have been subjected to if they had never been made. While this Court has indicated in its first opinion that it felt that Congress had authorized the sort of publication complained of, the Supreme Court felt otherwise by maintaining and prohibiting the publication until the petitioner's U.S. patent was issued in July, 1959. Furthermore, if the affidavits in question should succeed in invalidating some of Spevack's foreign patents, it would only increase his complaint and claim for damages in an action against the A.E.C. and/or United States for the wrongful publication.

CONCLUSION

For the foregoing reasons the appellant, Joseph Y. Houghton submits that the petition below should have been dismissed and requests this Court to remand the case to the District Court with directions to dismiss the petition.

Respectfully submitted,

CARLETON U. EDWARDS, II
1000 Vermont Avenue, N.W.
Washington, D. C.
Attorney for Appellant

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE PETITION OF J. WILLIAM)
PIKE FOR ACCESS TO IMPOUNDED) Misc. 4-64
RECORD)

DOCKET ENTRIES

Date	Proceedings
1964	
Jan. 31	Petition of J. William Pike for access to the record in the case of Jerome S. Spevack v. Lewis L. Strauss et al., Civil Action No. 880-57; c/m 1-31-64; Exhibit; M.C. 1-31-64; filed.
Feb. 8	Motion of respondent to dismiss; P & VA; c/m 2-8-64; app. Joseph Y. Houghton.
Feb. 14	Response of U. S. and its officers and agencies to petition of J. William Pike for access to impounded record; appearance of David C. Acheson and Joseph M. Hannon filed.
Feb. 17	Opposition of petitioner to respondent's motion to dismiss; P & A; filed.
Mar. 3	Appearance of Carleton U. Edwards, III, for Joseph Y. Houghton filed.
Mar. 3	Affidavit of Joseph Y. Houghton filed.
Mar. 3	Supplemental ground for respondent's motion to dismiss petition filed.
Mar. 3	Order denying respondent's motion to dismiss petition, granting petition for access to records provided record remain impounded five days to allow time for appeal and if appeal is noted, record is to remain impounded until final disposition of matter. Sirica, J.
Mar. 6	Notice of appeal by Joseph Y. Houghton; copies mailed to J. William Pike and Joseph M. Hannon filed.
Mar. 6	Cost bond on appeal of Joseph Y. Houghton with Northwestern National Insurance Co. in the sum of $250.00 approved and filed.
Apr. 13	Order extending time for filing record on appeal to and including May 20, 1964. Curran, J.

[Filed January 31, 1964] Misc 4-64

IN RE PETITION OF J. WILLIAM PIKE
FOR ACCESS TO IMPOUNDED RECORD

This is a petition for access to the record in the case of Jerome S. Spevack v. Lewis L. Strauss et al, Civil Action No. 880-57. The record at present is impounded by the Court.

Your petitioner is a patent attorney practicing in the District of Columbia. He represents a client who is interested in determining when there was first published the subject matter of the Spevack U. S. patent application Serial No. 188,295 which eventually issued as patent No. 2,895,803. He knows for reasons which will appear hereinafter that there are certain exhibits of record in the Spevack case which have a bearing on this question and it is believed that this record should now be made public.

The action was brought by Spevack to enjoin the members of the Atomic Energy Commission from publishing the subject matter of the Spevack application after this material was declassified. The judicial proceedings were quite extensive, reaching the Supreme Court of the United States on two occasions. The pleadings of the parties in the Supreme Court are available to the public and your petitioner has in fact obtained from the records of that court, extra copies of the briefs filed by the parties in the two proceedings, No. 641 of the October Term, 1957 and No. 339 of the October Term, 1958.

Attached hereto are copies of pages 8-13 of the Brief For The Respondents in Case No. 339 and this provides a complete history of the judicial proceedings up to that proceeding. The decision of the Supreme Court in No. 339 is reported at 359 U.S. 115, and the Court remanded the case to the District Court with instructions to continue the case until Spevack's patent issued if he had by May 25, 1959, paid the final fee and then dismiss the case as moot or otherwise, on May 25, 1959, to dismiss the complaint on the ground that, apart from the merits of the controversy, the grant of the extraordinary equitable relief of an injunction at that stage of the proceedings would not be warranted. It was stated that upon the fulfillment of either of these conditions, the proceedings heretofore had in the two lower courts were vacated.

Spevack did in fact pay the fee within the time specified and his patent issued as No. 2,895,803 on July 21, 1959.

The record in Civil Action No. 880-57 was, of course, properly impounded throughout the entire course of the judicial proceedings but it is submitted that when patent 2,895,803 issued and the proceedings in the lower courts were vacated by the ruling of the Supreme Court, the impoundment of the record in Civil Action 880-57 should also have been vacated at that time.

The footnote to page 10 of the attached copy shows that it is a matter of public record that certain exhibits were filed by the Defendants in the District Court Action purporting to show that the subject matter in question was published between February 6, 1957 and April 10, 1957, the day upon which the instant proceedings were instituted. Since these documents have been identified and described, it is believed that the physical exhibits, themselves, should be available to the public and the instant petition is to be construed as requesting the right to inspect them and make copies, even if for some reason not known to your petitioner, the entire record should not be made public. If, as contended by Spevack, the affidavits are incompetent and insufficient to prove publication, he should have no objection to ther being made available to anyone desiring independently to judge their sufficiency.

It is vigorously contended that the continuance of the order impounding the record in this case long after its disposal violates the traditional American concept of granting wherever possible free public access to all judicial processes.

Accordingly, it is respectfully requested that this petition be granted.

Respectfully submitted,
/s/ J. William Pike

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing paper was served on each of the Parties Jerome S. Spevack and Lewis L. Strauss, et al by mailing a copy thereof to their respective attorneys, by regular mail, on January 31, 1964, at the following addresses:

Joseph Y. Houghton
1317 F Street, N.W.
Washington 4, D.C.

Roland A. Anderson
Chief, Patent Branch
Office of the General Counsel
Atomic Energy Commission
Washington 25, D. C.

/s/ J. William Pike

[Filed January 31, 1964]

EXHIBIT

* * * * *

2. The judicial proceeding. - On April 10, 1957, petitioner filed his complaint for injunctive relief (R. 1-13). The basic theory of the complaint was that, as the result of the 1950 secrecy order, petitioner was deprived of the benefits of the Convention for the Protection of Industrial Property, viz, that, if he could have filed his patent applications abroad within a year of the filing of his application with the United States Patent Office, these foreign applications could not have been defeated by any publication made during that year (R. 4,5). Petitioner therefore asked that the publication of information with regard to his process be enjoined lest he be barred from obtaining patents abroad. He assured the court that he was taking steps to file patent applications in 21 foreign countries as rapidly as possible. (Complaint, par. 15, R. 6).

In his complaint, petitioner also alleged that the Commission had no right to publish the improved processes because it had received the information in a confidential disclosure (R. 4-5). Although the complaint alleged that contracts petitioner had with the Commission "expressly recognized his rights in the subject matter disclosed to the A.E.C. by him" (R. 2), it thereafter referred only to disclosures made in petitioner's patent application and under the reporting provisions of the Atomic Energy Act (R. 2), omitting reference to disclosures made by petitioner during his work as an employed consultant. Such disclosures were only later conceded by petitioner and found by the district court (supra, pp. 4-5, and n. 5).

On the same day that the complaint was filed, April 10, 1957, petitioner obtained a temporary restraining order on the ground that the consequence of "the disclosure of the subject matter of plaintiff's U. S. Patent Application, Ser. No. 188,925, prior to his application for foreign patents * * * would be to destroy plaintiff's right to obtain foreign patents on his said invention in most foreign countries * * *" (R. 14-15). The order enjoined respondents from "causing or permitting the dissemination of any documents, reports, memoranda, technical data, in their pleadings in this action, or otherwise, disclosing the heretofore unpublished features of plaintiff's [petitioner's] Patent Application * * *."

Petitioner's motion for a preliminary injunction was opposed on the ground that the litigation had become moot. Affidavits and technical manuals attached to respondents' opposition to the motion for preliminary injunction indicated the extent of the dissemination and publication of the processes of heavy water production which had occurred pursuant to the declassification orders (R. 17, 19-37). Finding that reports containing a description of the improvements claimed by petitioner had been disclosed to the public before this suit was filed,[9] the district court denied the motion for a preliminary injunction.

The Court of Appeals affirmed (Pet. Br. App. 9a-11a). It held that under Sections 3(b) and 141 of the Atomic Energy Act of 1954, 42 U.S.C. (Supp. V) 2013(b), 2161, App. A., infra, pp. 53, 54-55, respondents possessed the statutory authority to disclose the data here involved and that petitioner did not allege any statutory limitation, but, at best, challenged respondents' discretion in exercising their power. Hence, the court reasoned, the complaint actually constituted an unconsented suit against the United States which

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[9]The secrecy order had been lifted on or about February 1, 1957. By February 6, 1957, the manuals and reports started to become available to the public (R. 19, 20). Petitioner instituted these proceedings on April 10, 1957, i.e., two months later.

Respondents' exhibits in this suit showed that, during the interim period, the manuals and reports had been open to the public in three technical libraries of the Commission (R. 19, 21, 31-34) and at offices and libraries of several A.E.C. contractors (R. 22, 30) and that they had been transmitted to a Canadian body and to a Swedish firm engaged in atomic energy work (R. 24, 25, 27). Petitioner has contended that the affidavits were incompetent, insufficient to prove publication, and, in any event, did not establish publication in a number of countries which will grant a patent as long as no domestic publication has occurred (R. 61, 64, 66-68, 72-78; Pet. Br. 40-47).

Petitioner's Petition for Discovery and the Supplement thereto, filed in this Court on August 25 and September 12, 1958, revealed that an article was published in July 1958 in a West German scientific journal, which disclosed features of his process. Petitioner stated that the periodical has "wide international distribution"; we believe that it can be found in scientific and university libraries throughout the world. While petitioner unsuccessfully sought to demonstrate that this publication was respondents' fault, his own papers in that petition furnish confirmation of mootness. For the reasons stated in n. 2, supra, however, we have not reargued the issue of mootness in this brief.

should have been dismissed for lack of jurisdiction, rather than on the ground of mootness. In these circumstances the Court of Appeals did not reach the latter issue (Pet. Br. App. 10a).

The judgment of the Court of Appeals was entered on September 19, 1957 (Pet. Br. App. 11a-12a). Twelve days later, petitioner applied for leave to amend his complaint so as to include allegations that respondents lacked statutory authority to publish any data relating to an invention not owned by the United States without the consent of the inventor or, in the alternative, that the statute would be unconstitutional if it purported to have such effect (Pet. Br. App. 12a-14a; R. 87-94). The Court of Appeals denied the motion to amend the complaint, and also denied a motion for a rehearing filed on October 4, 1957 (Resp. Br. App. 63; R. 124).

Upon petition for a writ of certiorari, this Court granted the writ and remanded the cause to the Court of Appeals with instructions to allow the proposed amendments, and to determine the issues raised by petitioner's appeal in the light of the amendment (Resp. Br. App. 65; 355 U.S. 601). On remand, the Court of Appeals adhered to its earlier decision (Pet. Br. App. 14a-16a). It held that it had earlier determined that the Atomic Energy Act authorized "this sort of publication," i.e., the dissemination in these circumstances of such scientific and technical information relating to atomic energy. Relying on the decisions of this Court in Yearsley v. Ross Construction Co., 309 U.S. 18, 21; United States v. Causby, 328 U.S. 256; and Larson v. Domestic and Foreign Corp. 337 U.S. 682, 697, n. 18, the Court of Appeals held that this interpretation of the statute did not render it unconstitutional. If the publication constituted the taking of the property right of an inventor, the United States had promised either expressly or by implication to pay just compensation to the owner and had afforded him a remedy for its recovery in the Court of Claims; the availability of this judicial remedy fully satisfied the requirements of the Fifth Amendment which does not command the payment of damages by the United States prior to the taking. Since the amended complaint failed to state a claim upon which relief could be granted, the case was ordered remanded with instructions to dismiss (Pet. Br. App. 16a). This Court granted certiorari on October 27, 1958 (Resp. Br. App. 68).

* * * * *

[Filed February 8, 1964]

RESPONDENT'S MOTION TO DISMISS PETITION FOR WANT OF JURISDICTION AND FOR LACK OF INDISPENSABLE PARTIES, ETC.

Comes now, Joseph Y. Houghton, respondent, appearing in proper person, and moves the Court to dismiss the instant petition for access to impounded record in C.A. 880-57 in this Court, for want of jurisdiction, lack of indispensable parties, lack of real party in interest, for the following reasons, among others:

1. (No "action" pending). There is no "action" pending in which this "petition" could be filed, and in this respect the petition violates F.R.C.P. Rule 3, which states: "A civil action is commenced by filing a complaint with the Court". In addition the petition violates F.R.C.P. Rule 7(b), which states in part "An application to the court for an order shall be by motion...".

2. (Neither "Real Party in Interest before the Court). The "petition" states in part: "He represents a client who is interested in determining..." Thus the petition violates F.R.C.P. Rule 17(a) which states in part "Every action shall be prosecuted in the name of the real party in interest....". The petition shows on its face that the petitioner is not the real party in interest. In addition, it is the interest of Jerome S. Spevack, plaintiff in C. A. 880-57, which is involved, and he is also not a party to the petition, nor is he before the court, by petitioners act of merely mailing a copy of the petition to Spevack's counsel in a case which terminated in July, 1959, as indicated below.

3. (Indispensable Party Not Before Court). As indicated above, the person whose interest is here involved, Jerome S. Spevack is not before this Court on this petition. He is an "indispensable party" under the Federal Rules of Civil Procedure, including Rules 12(b), 19, and 41(b).

In addition to the reasons set forth above, the petitioner has informed respondent that he has requested Judge Joseph McGarraghy, who signed the original impounding order to vacate said order, which was refused. Also, when the final order in said action was signed by Judge Letts, the proposed order providing for a termination of the impounding of said record was specifically deleted, leaving the impounding in effect.

If for any reason this motion should be denied, respondent request leave of the Court to oppose the petition on the merits.

/s/ Joseph Y. Houghton
Respondent

* * *

POINTS AND AUTHORITIES

Federal Rules of Civil Procedure cited above, and the Inherent power of the Court.

/s/ Joseph Y. Houghton

[Certificate of Service]

[Filed February 14, 1964]

RESPONSES OF UNITED STATES AND ITS OFFICERS AND AGENCIES TO PETITION OF J. WILLIAM PIKE FOR ACCESS TO IMPOUNDED RECORD

Comes now the United States Attorney for the District of Columbia and in response to the Petition of J. William Pike for Access to Impounded Record informs the Court as follows:

1. He represents the interests of the United States and its officers and agencies insofar as such interests are germane to the instant petition.

2. Civil Action No. 887-57 entitled Jerome S. Spevack v. Lewis L. Strauss, et al. was an action brought by Spevack to enjoin disclosure by the Atomic Energy Commission of certain documents and information provided by Spevack.

3. During the pendency of the action all pleadings and exhibits were impounded.

4. The final order signed by Letts, J. on July 23, 1959 did not provide for the opening of the impounded record.

5. The United States, its officers and agencies interpose no objection to the instant petition which seeks to vacate the order which impounded the record in the Spevack case, Civil Action No. 887-57.

6. It is our understanding that Jerome S. Spevack is represented by Joseph Y. Houghton, as counsel, and that Mr. Houghton is thereby qualified

to represent the interests of Spevack. The impounding order was entered at Mr. Spevack's request.

/s/ David C. Acheson
United States Attorney
/s/ Joseph M. Hannon
Assistant United States Attorney

[Certificate of Service]

[Filed February 17, 1964]

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PETITION

Now comes your Petitioner, J. William Pike, and asks that the Court deny the motion of Joseph Y. Houghton to dismiss the instant Petition for Access to Impounded Record in C.A. 880-57.

Respondent's motion seeks to have the Petition dismissed on purely technical grounds having nothing to do with the merits. The technicalities raised in opposition to the Petition have no bearing on the situation, since they are based on the false premise that the Petition is a civil action in which the Rules of Civil Procedure for the United States District Courts apply. Your Petitioner is not bringing suit, and F.R.C.P. Rule 1, having to do with the scope of the rules, specifically states that the rules govern the procedure in the United States District Courts in suits of a civil nature with certain exceptions which are detailed in a later rule.

The present matter is one which is purely discretionary with the Court. Petitioner is only asking that the Court acting within its discretionary power, release an impounded record which Petitioner feels should be available to the public at large. There is no "action" pending (paragraph 1 of respondent's motion), no "Real Party in Interest" (paragraph 2 of respondent's motion) and, certainly, no "Indispensible Party" not before the court (paragraph 3 of respondent's motion).

Obviously, Petitioner's client is interested in evaluating the validity of a foreign patent issued to Mr. Spevack, which he has every right to do. The date of the publication of the subject matter of the invention is a vital point

to be considered in this determination and it was shown in the Petition that it is a matter of public knowledge that exhibits bearing on this date are contained in the impounded record. Petitioner vigorously contends that any member of the general public should, after termination of the original proceedings, have the right to inspect the exhibits and determine for himself their effect upon the validity of any patent which Mr. Spevack may have obtained. From the briefs filed in the Supreme Court, and referred to in the Petition, it is clear that the exhibits in question detail certain acts of the United States Atomic Energy Commission, which actually transpired and no reason is seen that the exact nature of these acts should now be concealed from the public, nor can it be seen wherein Spevack would be injured by opening the record to the public, and the Motion to Dismiss is merely an obvious attempt to prevent others from ascertaining the true facts involved in the prior litigation.

Respondent's argument that Judge Joseph McGarraghy, who signed the impounding order, indicated to Petitioner that he did not desire to take it upon himself to voluntarily vacate the impounding order, has no bearing upon the true merits of the situation. It is only reasonable that Judge McGarraghy would want the parties to the original suit to have an opportunity to be heard before releasing the record, this being in the best interest of American justice. In fact, it is for this very reason that the present Petition was filed and served on the counsel of record for the original parties involved in Civil Action 880-57.

Moreover, the fact that in the final order, Judge Letts deleted the portion providing for termination of the impoundment of the record, is no indication that he felt that the impoundment should be continued. It is Petitioner's understanding that this deletion was made by Judge Letts without comment, and it is entirely reasonable to suppose that he merely considered it superfluous, assuming that the impoundment would automatically be terminated by the instructions of the Supreme Court that the proceedings theretofore had in the two lower courts be vacated upon fulfillment of either of the two alternative conditions which were laid down.

Petitioner has today been served with a paper filed in this proceeding on behalf of the Atomic Energy Commission and it is seen that this agency has no objection to the vacating of the order impounding the record. It is further pointed out in the United States Attorney's paper that Jerome S.

Spevack is represented by Joseph Y. Houghton, and there can be no doubt but that service on the latter is sufficient notice to the former for the purposes of the instant Petition, which, as pointed out above is not a suit against Mr. Spevack.

Accordingly, it is believed that Respondent's motion to dismiss the Petition should be denied.

Respectfully submitted,
/s/ J. William Pike

POINTS AND AUTHORITIES

Federal Rules of Civil Procedure, Rule 1.

/s/ J. William Pike

[Certificate of Service]

[Filed March 3, 1964]

AFFIDAVIT OF
JOSEPH Y. HOUGHTON

Come now Joseph Y. Houghton, and being first duly sworn on oath, deposes and says as follows:

1. I was one of the attorneys for the plaintiff, in the case of Jerome S. Spevack vs. Lewis L. Strauss, et al, C.A. 880-57 in this court which action was concluded in July, 1959 by an order signed by Judge Letts.

2. I received in the mail a paper entitled, "In re Petition of J. William Pike for Access to Impounded Records", the certificate of service of which purports to have served a copy of said paper on said Jerome S. Spevack by mailing a copy to me on January 31, 1964.

3. I have no authority to submit interest of said Jerome S. Spevack to the jurisdiction of the court in this so called "Miscellaneous" matter and submit that none exists as a matter of law merely because I represented him in said C. A. 880-57.

/s/ Joseph Y. Houghton

[JURAT dated March 2, 1964]

[Filed March 3, 1964]

SUPPLEMENTAL GROUND FOR "RESPONDENT'S MOTION TO DISMISS PETITION"

In addition to the grounds set forth in "Respondent's Motion to Dismiss Petition for Want of Jurisdiction...", respondent states an additional ground (which is implicit in those already stated), which is as follows:

4. THERE IS NO KNOWN STATUTORY OR OTHER BASIS FOR THIS PETITION. The jurisdiction of the U. S. District Courts is prescribed by statute, and should be found in either the U. S. Code, the D. C. Code, or at least there should be some mention of it in the Local Civil Rules. Respondent's counsel has been unable to discover any statutory or other basis either in the laws referenced above or elsewhere, or any indication as to what rules apply (other than the Federal Rules of Civil Procedure, which apply to Federal Courts generally) in this action. In the absence of some such basis, it is submitted that this Court has no jurisdiction to entertain this petition. Petitioner admits, or claims that this is not a civil action. Respondent asks, if it is not a civil action, then what is it, what is the basis for filing it, what rules apply?

/s/ Carleton U. Edwards, II
Attorney for Joseph Y. Houghton

* * *

[Certificate of Service]

[Filed March 3, 1964]

ORDER

This matter having come on for hearing upon the "Petition of J. William Pike for Access to Impounded Record" (in Spevack v. Strauss et al., C. A. 880-57 in this Court), and upon "Respondent's (Joseph Y. Houghton) Motion to Dismiss Petition for Want of Jurisdiction and for Lack of Indispensable Parties, etc." (and Supplement thereto), and upon consideration of the pleadings filed herein and a copy of the Order of Judge F. Dickinson Letts signed July 23, 1959 in said C.A. 880-57, which is a part of the impounded record

in said case (a copy of which order is made a part of the record herein), and arguments of counsel in open Court, it is, this 3rd day of March, 1964,

ORDERED:

1. That the Respondent's Motion to Dismiss the Petition be and the same hereby is denied;

2. That the said Petition for Access to said impounded record be and the same hereby is granted, provided however, that said record shall remain impounded for a period of five days from the date of the signing of this order for the purpose of giving the respondent time within which to file an appeal to the appropriate Court, and provided further, that in the event an appeal is not noted within said five day period, said record shall be released from the order of impoundment, and provided further, that in the event an appeal is noted to the appropriate Court, the said record shall remain impounded subject to final disposition of the matter on appeal.

/s/ John J. Sirica
Judge

Seen:

/s/ J. William Pike
Petitioner

/s/ Carleton U. Edwards, II
Attorney for Joseph Y. Houghton

/s/ Joseph M. Hannon
Asst. U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME S. SPEVACK,)
Plaintiff,)
v.) CIVIL ACTION
LEWIS L. STRAUSS, et al.,) NO. 880-57
Defendants.)

O R D E R

Upon consideration of the remand of this cause to this Court by the Supreme Court of the United States with instructions to dismiss this complaint as moot upon the issuance of the patent applied for (Patent No. 2,895,803, issued on Application Serial No. 188,925) by the plaintiff, and the said patent having issued on July 21, 1959, it is by the Court this 23rd day of July, 1959,

ORDERED, that the complaint be and the same hereby is dismissed as moot; ~~and it is~~

~~FURTHER ORDERED, that the records and dockets of this Court relating to this cause be and the same hereby are no longer impounded.~~

7/24

J. Holtzoff
JUDGE

[Filed March 6, 1964]

NOTICE OF APPEAL

Notice is hereby given this 6th day of March, 1964, that JOSEPH Y. HOUGHTON, hereby appeals to the United States Court of Appeals for the District of Columbia from the Order and judgment of this Court entered on the 3rd day of March, 1964 in favor of J. William Pike against said Joseph Y. Houghton.

/s/ Carleton U. Edwards, II
Attorney for Joseph Y. Houghton

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,630

JOSEPH Y. HOUGHTON, *Appellant*,

v.

J. WILLIAM PIKE, *Appellee*.

Appeal From an Order of the United States District Court for the District of Columbia Granting a Petition of Appellee for Access to Impounded Record in Civil Action 880-57

J. WILLIAM PIKE
540 Shoreham Building
15th & H Streets, N. W.
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

APPELLEE'S STATEMENT OF QUESTION PRESENTED

The broad question presented by this appeal, simply stated, is whether a District Court of the United States has jurisdiction over its own records so that for good reason shown it can, within its discretion, deimpound a record which it had previously impounded. The answer to this question is clearly in the affirmative, since if the Court has power to impound a record in the first instance, it also has the power to deimpound a record previously impounded.

SUBJECT MATTER INDEX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,630

JOSEPH Y. HOUGHTON, *Appellant,*

v.

J. WILLIAM PIKE, *Appellee.*

Appeal From an Order of the United States District Court for the District of Columbia Granting a Petition of Appellee for Access to Impounded Record in Civil Action 880-57

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

A counter-statement of the case is deemed necessary only to criticize the portion of Appellant's "Statement of the Case" represented by the last paragraph of page 2 of his brief. The misleading inference of this paragraph is that the entire scientific community would be opposed to the present petition for access to the impounded record because briefs *amici curiae* were filed by the American

Chemical Society and the Engineers Joint Council, Inc. in both of the previous cases before the Supreme Court. These briefs, however, merely urged that governmental agencies should not publish inventions disclosed to them in secret, and have nothing to do with the present question of whether, after publication of an alleged invention through the issuance of a patent by the U. S. Patent Office, the proceedings in an action for an injunction to prevent prior publication of the same by the Atomic Energy Commission, and Affidavits in the record asserting that publciation had already occurred prior to the efforts to enjoin publication, should be suppressed. It is submitted that Appellant has not shown, as is implied, that the scientific community would oppose the present petition for access. On the other hand, the public interest in matters that may affect Spevack's patents would, in itself, now require public access to the impounded record.

SUMMARY OF ARGUMENT

The District Court properly granted Appellee's petition for access to the impounded record in Civil Action 880-57.

The purely technical objections raised by appellant to the granting of the petition are without merit. The District Court has direct control over its own records. It requires no statutory authority to either impound or deimpound such records, and can do either at its discretion.

A petition for access to an impounded Court record is not a civil "action" to which the Federal Rules of Civil Procedure are applicable. Appellee did not bring suit and therefore there was no reason to file a complaint or serve a summons upon anyone. The petition is properly addressed to the Court. Appellee, like any other member of the public has a perfect right to file such petition. Mr. Spevack was duly notified of the petition by serving a copy of it on his attorney in the original suit, Joseph Y. Houghton, appellant herein, and this was sufficient to enable

him to get in touch with his client, which he did, and to put forth any objections both may have had to the deimpoundment of the record, which he also did. Whether Appellee's document filed herein is denominated a "Petition" or a "Motion" is purely a matter of nomenclature and not substance.

The reason for the deletion of the portion of the final order in Civil Action 880-57 calling for deimpoundment of the record is not known, but the control of the District Court over its own records is a continuing one and an impounded record can be deimpounded at any time that this is found fitting and proper.

ARGUMENT

It is submitted that the District Court properly granted Appellee's petition for access to the impounded record in Spevack v. Strauss, Civil Action 880-57.

In the first place, it is seen that Appellant contends strongly in his brief that Appellee's petition for access to the impounded record in Civil Action No. 880-57 should have been denied because this petition was not, itself, a civil *action* properly brought within the terms of the Federal Rules of Civil Procedure. Specifically, it is stated that Appellee's petition violates Rule 3, which states, "A civil action is commenced by the filing of the complaint with the Court", Rule 7(b) which states in part "Application to the court for an order should be by motion . . . ", and Rule 17(a) which states in part, "Every action shall be prosecuted in the name of the real party of interest. . .".

It is Appellee's position that his petition does not violate the Rules, since the petition is not at all an "action" to which the Rules are applicable. The petition is merely a request, addressed to the Court, that the Court act within its discretionary power and release to the public a record which, while obviously correctly impounded during the pendency of Civil Action No. 880-57, should have been

made available to the public at large after termination of this action by the vacating of the proceedings below by the Supreme Court of the United States. The petition, in effect, is a "motion", and contentions of non-compliance with the Rules based upon nomenclature is picayunish. Furthermore, any member of the public has the right to seek access to an impounded record and he manifestly would not do so unless he had some "real interest" therein. It is Appellee's further position that the United States District Court for the District of Columbia has direct control over its own records and that it is entirely a matter within the discretion of the Court, and not statutory, whether the record in the civil action in question shall remain impounded after the termination of that action. Certainly, there existed no valid reason for impounding the record after the U. S. Spevack patent had issued on July 21, 1959, and printed copies thereof were available to anyone and exchanged with other countries throughout the world, as is the custom.

Appellant points out in his brief that before signing the final order in Civil Action 880-57, Judge Letts deleted a portion calling for the deimpoundment of the record, but as Appellee stated in his memorandum in opposition to the motion to dismiss the petition (JA 9), the deletion was made without comment and may have been done simply because Judge Letts considered it superfluous, assuming that the impoundment would automatically be terminated by the instructions of the Supreme Court that the proceedings theretofore had in the two lower courts be vacated upon fulfillment of either of the two alternative conditions which were laid down, one of which was the issuance of the U. S. patent to Spevack. Certainly it is not believed that the Supreme Court would have left its entire record unimpounded (which shows that affidavits are in existence detailing what had been done by the Atomic Energy Commission in publishing the Spevack invention and revealing much as to their content) if the Court had intended that

impoundment of the record in the lower court was to continue.

In any event, it is submitted that the District Court's power to deimpound the record is a continuing one, and that this power can be exercised at any time it sees fit. It is vigorously contended that having had the power to impound the record in the first place, the District Court now clearly has the power to deimpound it.

Appellee is quite willing to concede that he has no more right to gain access to this record than does any other member of the general public and, therefore, it makes no difference whether he personally is or is not a "real party in interest". Appellee does have a legitimate and real interest in gaining access to the impounded record, since, as pointed out in the petition, itself, he was asked by a client to determine when there was first published the subject matter of the Spevack invention. This client was not identified in the petition for access, since this was not believed to be material, but his identity was revealed to Judge Sirica and Appellant, upon Judge Sirica's request that this be done at the oral hearing in the proceedings below.

No merit is seen in Appellant's contention that Jerome S. Spevack, a party to Civil Action 880-57, was not brought before the court by petitioner's action of mailing a copy of the petition to counsel who represented Spevack in the original action, and who is here opposing deimpoundment, not as "a party in interest", but is doing so solely in an effort to suppress a record in which his client was involved as a party. No action is being brought against Mr. Spevack and the sole purpose of serving a copy of the petition upon his attorney was to give him an opportunity to interpose any objection he might have to the opening of the record in the case of Spevack v. Strauss. It is believed to be clearly evident that this purpose was accomplished and that Appellant's opposition is being asserted solely in behalf of Mr. Spevack.

The Atomic Energy Commission was given notice of the petition in this same manner and the Commission responded by the filing of a paper through the Office of the United States Attorney (JA 8) which informed the Court that this body had no objection to the deimpounding of the record.

Insofar as the question of deimpoundment is based on the true merits of the situation, it is not seen, nor has it been shown, that Mr. Spevack will be in any way injured by the release of the record for public inspection. Appellant contends in the first place that the material in the affidavits would not have the affect of invalidating any of Mr. Spevack's patents, but in the same breath speculatively says that the affidavits could result in considerable litigation and cause him much expense and harassment. Since Mr. Spevack is the patent owner, it is obvious that he would be the initiating party to any litigation and that he would not be "harassed" under any circumstance. If Appellant means that there is something in the impounded material which would lead one to believe that a particular patent could safely be ignored, then it is in the public interest that such material be made available. Moreover, it is believed to be obvious that the potential infringer, knowing from the briefs before the U. S. Supreme Court that the Atomic Energy Commission had asserted in the record of the District Court that it had previously published the invention, would not be any more apt to honor the patent than it would if it had been able to gain access to said record for the purposes of evaluation. If the impounded record becomes available, and one sued by Mr. Spevack attempted to employ it as a defense, Mr. Spevack would have full and ample opportunity to attack it on any proper ground.

Appellee is not concerned with the question of whether any action taken by the Atomic Energy Commission to publish Mr. Spevack's disclosure was right or wrong, but he does believe that he, or anyone else, should have the

right to determine the exact nature of this publication, assuming it is an accomplished fact. In this regard, it is not believed that this Court should be influenced by Appellant's thinly veiled threat, in contending that the releasing of the record in Civil Action 880-57 could increase Mr. Spevack's claim against the United States for the allegedly wrongful publication. Mr. Spevack has known of the alleged publication since prior to the issuance of his U. S. patent, but obviously has taken no action to remove any cloud that said publication may have cast upon this patent or any other of his patents.

It appears from this record that Appellant is desperately attempting to suppress the material in the affidavits regarding publication of the alleged Spevack invention prior to Spevack's attempts to enjoin the U. S. Atomic Energy Commission from publishing the subject matter thereof. If publication was in fact made, then, as a matter of public policy, the record should be deimpounded so that this information will be available to anyone and everyone who may be interested in the validity of any Spevack patent. In other words, the Appellant is seeking here, for Spevack's benefit and none other, to prevent anyone from ascertaining information with respect to when, where or how publication was made, and thus hide such publication from the public. Such conduct should not be sanctioned.

CONCLUSION

The action of the District Court deimpounding the record should be affirmed.

Respectfully submitted,

J. William Pike
540 Shoreham Building
15th & H Streets, N. W.
Washington, D. C.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,630

JOSEPH Y. HOUGHTON,

Appellant,

v.

J. WILLIAM PIKE,

Appellee.

Appeal From a Judgment of the United States District Court for the District of Columbia

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PETITION FOR REHEARING IN BANC

Appellant respectfully petitions the Court, pursuant to Rule 26 of the Rules of this Court, for a rehearing in the above-entitled cause by the entire Court sitting in banc, for the reasons hereinafter set forth.

PRELIMINARY STATEMENT

On January 31, 1964, the appellee, J. William Pike, a patent attorney, filed in the Clerk's office of the U. S. District Court a paper entitled "In Re Petition of J. William Pike for Access to Impounded Record", which was given the designation by the Clerk of "MISC 4-64" (JA 2). Pike did not identify the client for whom he was appearing but stated: "He represents a client who is interested in determining when there was first published the subject matter of the Spevack U.S. patent application Serial No. 188295 which eventually issued as patent No.

2,895,803." No summons was issued and no process was served on anyone (JA 1), but Pike indicated by his certificate of service that he had mailed a copy of the said petition to Joseph Y. Houghton (JA 3, 11), one of the attorneys representing Jerome S. Spevack in Civil Action 880-57 mentioned above which had concluded by an order signed by Judge Letts on July 23, 1959 (JA 14).

The aforementioned "petition" was not served on Jerome S. Spevack, the person most interested in the impounding of the record in CA 880-57; and as mentioned above, the person whom J. William Pike was representing was not disclosed (JA 2).

Thereafter Houghton appeared in his own behalf and filed a Motion to Dismiss the said petition for want of jurisdiction on the basis that no "action" was pending, that neither "real party in interest" was before the court, and also that the matter had already been considered between the parties involved and decided by the court in CA 880-57, and that there was no statutory or other basis for the said petition (JA 7, 12).

Thereafter the appellant Houghton filed his affidavit indicating that he had received a copy of the aforementioned petition in the mail but that he had no authority to submit the interest of Jerome S. Spevack in the matter to the jurisdiction of the Court (JA 11).

On March 3, 1964 the petition and motion to dismiss came on for hearing in the District Court and an order was signed denying Houghton's motion to dismiss and granting the petition and providing that the record remain impounded pending appeal if an appeal was noted from the order within five days, etc.

On March 6, 1964 the notice of appeal was filed (JA 15).

Thereafter the appeal was argued and on January 14, 1965, the Court entered a Judgment dismissing the appeal on the grounds that appellant Houghton "had no authority (on his own affidavit) to submit

the interest of said Jerome S. Spevack to the jurisdiction of the Court . . .", and further that Houghton "has no personal interest in the outcome of the events which transpired in the District Court . . .".

ARGUMENT

I. The Merits of the Appeal Should Be Considered

The Petition for Rehearing In Banc should be granted because:

1. For the reasons set forth in the Appellant's brief filed in this case, the contents of which are in corporated herein by reference, the merits of the controversy not having been considered, said reasons being:

A. The petition should have been dismissed because there was no "action" pending.

B. The petition should have been dismissed because neither "real party in interest" was before the Court.

C. The petition should have been dismissed because the matter of de-impoundment of the record had already been considered by Judge Letts between the parties concerned, and denied.

D. The petition should have been dismissed because there is no known statutory or other basis for the petition.

E. The petition should have been dismissed because the order appealed from violated basic principles of equity recognized in prior proceedings, involved in this matter by the Supreme Court.

II. The Case of *United States v. Siegel,* Cited by the Court Is Not in Point, and Appellant Was a "Party to the Record" Below Entitled To Appeal

The case of *United States v. Siegel,* 83 U.S. App. D.C. 88, 168 F.2d 143 (1948) cited by the Court is not in point with the instant case, because there the United States sought to appeal from a lower court

judgment, while as shown at 83 U.S. App. D.C. 89, "The United States was never a party to the record in the court below." The question there involved as stated by the Court at 83 U.S. App. D.C. 91 was:

> "But the question before us in the case at bar is whether the case is in this court — whether a person who was not a party to the record in the District Court and who made no effort to become a party there, can bring the case into this court simply by noting an appeal. He could not do so under the cases we have cited and discussed. If he could not, the case is not in this court and so a motion to substitute parties could not be entertained here."

In the instant case, on the contrary, appellant Houghton was a "party to the record in the court below", a "petition" having been served upon him and he having answered same. Also this Court has found him to be a party to the extent of taxing costs against him. Houghton was just as much a "party" as was the appellee Pike, which the Court should have recognized. Pike represents an undisclosed principal and has no more personal interest in the outcome than does Houghton. Indeed it is appellant's contention that in fact there were no proper parties below and the proceeding below was a nullity, as set forth in the appellant's brief incorporated by reference above.

In 4 Am. Jur 2d, Appeal and Error, para. 173, p. 685, it is stated:

> "It has been said that the common law limited the right to appellate review, whether by writ of error or appeal, to those who were parties or privies to the action in which the judgment or decree complained of was rendered, and this rule has been incorporated in most of the statutes regulating the subject . . ."

Para. 174, p. 686:

> "Under the rule that parties to the proceedings may appeal, it is sufficient if the person invoking the appellate jurisdiction was actually made a party before the decree, either by express order of Court or by acting or being treated as such."

In 4 C.J.S., Appeal and Error, para 169, p. 540, it is stated in part:

> "As a general rule, a party or privy to the record or one who is injured by a judgment, or who will be benefited by its reversal, may appeal or sue out a writ of error."

Under these principles, it is urged that appellant Houghton does have the right to appeal, as he by the record below was regarded as a party.

III. Appellant Houghton as "A Member of the Public" Has as Much Interest in the Matter Before the Court as Does the Appellee Pike

Appellee, in his brief at page 4, urged:

> "Furthermore, any member of the public has the right to seek access to an impounded record and he manifestly would not do so unless he had some 'real interest' therein."

If this be true then any member of the public such as appellant Houghton should certainly have an equal right and interest to oppose what he feels is not fair and equitable, and it is equally manifest that he would not do so unless he had some "real interest" in the matter. And more narrowly, if Pike as an officer of the Court has standing to seek deimpoundment of a record, then Houghton, who is also an officer of the Court, has equal standing to oppose such action. In any

event it appears that the "real interest" represented by Pike is the interest of some unidentified foreign entity seeking the assistance of a U.S. Court without subjecting itself to the jurisdiction of the Court. Appellant contends that such a party has no standing to seek such assistance, and that Houghton does have standing to so maintain.

IV. Appellant Houghton Does Have a Personal Interest in the Outcome of the Events Which Transpired in the District Court, Contrary to the Court's Finding

The Court was in error in stating:

> "and it further appearing that said person [Houghton] has no personal interest in the outcome of the events which transpired in the District Court, which he seeks to appeal, and it therefore appearing that he has no standing to appeal . . . ."

Appellant Houghton does have a "personal interest" if for no other reason then to maintain fully the fruits of his labors over a period of three years in the cases of *Spevack v. Strauss*, and his position that matters improperly attempted to be injected into that case without right of cross-examination (and kept impounded by Judge Letts in acting under the Supreme Court's mandate), should not be made available to one seeking possibly to use the same in jurisdictions less zealous to protect the rights of the individual than the Courts of the United States, and without disclosing his or its identity.

CONCLUSION

In view of the foregoing, it is respectfully submitted that this case should be reviewed by the entire membership of the Court sitting in banc.

CARLETON U. EDWARDS II
1000 Vermont Avenue, N.W.
Washington, D.C. 20005
Attorney for Appellant

CERTIFICATE OF COUNSEL

I, Carleton U. Edwards II, Attorney for Appellant, do hereby certify that the foregoing petition for rehearing in banc is presented in good faith and not for delay.

CARLETON U. EDWARDS II
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing in Banc, was mailed, postage prepaid, this 29th day of January, 1965, to J. William Pike, 540 Shoreham Building, 15th & H Streets, N.W., Washington, D.C.

CARLETON U. EDWARDS II
Attorney for Appellant